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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF EMBARQ

Embarq opposes exclusive contracts[1] between telecommunications providers and multiple tenant environment (MTE) owners for both commercial and residential MTEs because they limit customer choice for the length of such contracts, which is often 10 to 15 years. The Commission has correctly prohibited exclusive contracts for commercial MTEs, and this same restriction on exclusive contracts should be extended to residential MTEs. Additionally, any prohibitions on exclusive contracts should be extended to interconnected VoIP providers because they also seek exclusive arrangements. Finally, Embarq strongly urges the Commission to approach exclusive arrangements holistically, and adopt the same rules for exclusives involving voice, video, data, or any combination of those services.

[1] There are varying types of "exclusive agreements. Some grant "exclusive" physical access to the property or premises and some include services as part of home owner association monthly dues. In Embarq's experience both types of contracts create a barrier to entry (either physical, economic or both) for providers not a party to these exclusive agreements.

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Exclusive Access Arrangements Should Be Prohibited in Developments as Well as Apartment Buildings. The prohibition on exclusive contracts in the residential market needs to be broadly defined to include not only traditional MTEs, like apartment buildings, but also residential developments of single family homes. This broader definition is clearly needed because developers of single family home communities are more frequently awarding the exclusive provision of voice, data and video services to the winner of a competitive bidding process.[2] This has the same end result as contracts in traditional MTEs—the developer controls what should be an individual homeowner's decision—what video provider to have, what internet connection to have and who will provide voice service. Consequently these arrangements preempt market competition and erect substantial barriers to entry by competitors.

The Commission Should Not Address Exclusive Arrangements for Voice Service in Isolation; Rather the Commission Should Adopt the Same Rules Regarding All Exclusive Access Arrangements. Embarq filed comments in response to the Commission's review of issues concerning the use of exclusive contracts for the provision of video services to multiple dwelling units or other real estate developments.[3] In its comments, Embarq encouraged the

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[2] For example, under a Florida law providing relief from carrier of last resort obligations when certain exclusive arrangements for voice services exist, of the 14 exemptions Embarq has received , there are a mix of residential communities, including some that are only single family homes and some that are multifamily homes.

[3] Comments of Embarq, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51 (July 2, 2007). A copy of those comments is attached as

Commission not to review video services in isolation as they relate to exclusive contracts. Embarq now encourages the Commission not to review voice services in isolation. The issues associated with exclusive arrangements for one of these services are generally the same as those associated with exclusive arrangements for the other services.

In Embarq's experience, property owners now rarely seek an exclusive contract for any one service but, instead, they typically seek contracts for multiple services, especially for broadband and video. Property owners are keenly aware that once the facilities for broadband and video services are deployed, voice service can be readily provisioned over the same facilities. Indeed, the Commission notes in the Public Notice inviting update of the record in this proceeding, "the market appears to be shifting from competition between stand-alone service to competition between service bundles including broadband, local exchange and long distance services."[4]

While recognizing this shift in the market, the Commission's Public Notice places emphasis on issues of exclusive contracts as they relate to telecommunications (i.e., voice) services. Embarq again encourages the Commission to make no distinction between voice, video and broadband services as they relate to exclusive contracts because, in today's environment, an exclusive contract for one service will inhibit the competitive provisioning of all three services. This is especially true in greenfield developments where

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Appendix A, and Embarq asks that they be incorporated in the record in this docket.

[4] Public Notice, at 1-2.

completely new network facilities must be built. An exclusive contract gives the contract winner an insurmountable advantage in the market. For instance, when a provider holds an exclusive contract for data and video services, building a second network to provision only telecommunications services would be an unreasonable business risk. The prospect of a reasonable return on such an investment in a reasonable period of time, if ever, would be poor.

While such investments are a poor risk, incumbent local exchange carriers (ILECs) are faced with having to make them on a regular basis. ILECs are generally obligated to serve as Carriers of Last Resort (COLRs), which means the ILEC is charged by law or regulatory rule to provide basic voice service to anyone in its service area who requests it. Theoretically, even in a development where an exclusive contract exists between the developer and a non-ILEC provider for telecommunications services, if one resident requests an ILEC's basic voice service the ILEC would be required to build facilities to serve the one customer.

Such laws and rules are blatantly unfair. The remedy is either to eliminate COLR responsibilities under appropriate circumstances (as a few states have done) or to prohibit exclusive contracts. Embarq favors the latter. Embarq is eager to compete head-to-head for customers and believes carrier selection should be made by the customers who use the service, and not by a developer.

Embarq explains its position in detail in its comments regarding the Commission review of issues related to exclusive contracts and video services,

which are attached as Appendix A. Its comments in that invitation to update the record are equally germane to this inquiry concerning telecommunications service. For that reason, Embarq hereby submits the attached comments in this proceeding and asks that they be incorporated in the record.

Respectfully submitted,

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July 30, 2007

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments	)	MB Docket No. 07-51

COMMENTS OF EMBARQ

I. INTRODUCTION AND SUMMARY.

The Commission has the authority to and should, indeed must, prohibit the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDUs") or other real estate developments.[1] Such exclusive arrangements impede competitive entry which harms consumers by keeping prices high and removing any incentive for the exclusive provider to upgrade facilities and provide innovative services.

However, it is important that the Commission not look only at exclusive contracts for the provision of stand-alone video services.[2] Increasingly, providers seek to provide the "triple play" of voice, high-speed internet, and video services. Exclusive arrangements to provide any of the three services or any combination of these services chill provisioning of the other services because exclusion from one of the three renders deployment of facilities for the remaining

[1] There are varying types of "exclusive agreements –some grant "exclusive" physical access to the property or premises and some are agreements to "exclusively" market services. However, often these exclusive marketing services involve billing through the developer or HOA and in Embarq's experience create a "de facto" exclusive access or near exclusive access arrangement. Both create a barrier for entry-either physical, economic or both.

[2] Embarq acknowledges the Commission just set July 30, 2007 as the date to Comment and refresh the record on the prohibition of exclusive arrangements for telecom services in WT Docket No. 97-217. Embarq encourages the Commission to consider that docket and the instant proceeding in concert.

services unsound and uneconomic. This is a serious problem, especially for a Carrier of Last Resort ("COLR") such as Embarq, and will jeopardize rapid and ubiquitous deployment of broadband services.

II. EXCLUSIVE CONTRACTS FOR THE PROVISION OF VIDEO SERIVCES WILL CHILL BROADBAND DEPLOYMENT.

The marketplace is rapidly evolving. Traditional telephone companies are no longer providing solely voice services, and they are no longer the sole providers of voice services. Traditional cable companies are no longer providing solely cable service, and they are no longer the sole providers of video programming. Increasingly, a diverse range of companies--traditional telephone and cable companies, wireless and satellite companies, and interconnected VoIP providers—are providing and seeking new ways to provide the "triple play" of voice, video, and high-speed internet. The Commission has noted this changing marketplace and recognized the consumer benefits and other public interest benefits that come when multiple companies compete for these services:

> New competitors are entering markets for the delivery of services historically offered by monopolists; traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market. Ultimately, both types of companies are projected to offer customers a "triple play" of voice, high-speed Internet access, and video services over their respective networks. We believe this competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings.[3]

[3] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* 22 FCC Rcd 5101, 5103 (2007). *("Cable Franchise Order").*

consumer, for the telecommunications market. The same can be said of the Act with respect to video and broadband services. Section 601(6) declares that one purpose of Title VI is to promote competition in cable communications.[5] Section 623(a) eliminates cable rate regulation when there is effective competition.[6] Section 628(a) declares it to be in the public interest to promote competition and diversity in the multichannel video programming market.[7] And Section 651 creates alternative means for telephone companies to provide video programming services.[8]

Likewise, Section 706[9] has become the rallying cry for the rapid deployment of broadband and increased broadband competition by directing the Commission to "encourage the deployment of ... advanced telecommunications capability to all Americans." For these purposes, Section 706 defines advanced telecommunications capability as:

> ... high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

The Act's encouragement of and direction for increased competition in voice, video, and broadband services is relevant to this proceeding because, as demonstrated above, the three services are increasingly interrelated and interdependent. An exclusive contract in one service prevents competition not just for that service, but increasingly for the remaining services as well.

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[5] 47 U.S.C. § 521(6).

[6] 47 U.S.C. § 543(a).

[77] 47 U.S.C. § 548(a).

[8] 47 U.S.C. § 571.

[9] 47 U.S.C. § 157, nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996).

The desire for increased competition produces many benefits, but one of the key benefits is the freedom of choice that robust competition provides consumers. There are now choices of plans, bundles, options, providers, price points, advanced services, plain old telephone services, information services, digital video service, and on-demand video and high-speed Internet services. All of this choice, as well as the lower prices that robust competition generally brings, are a desired outcome of the competition that the Act encourages. The outcome will be thwarted if exclusive contracts for the provision of video services, voice service, high-speed Internet services, or any combination thereof are allowed to continue. Indeed, such exclusive arrangements are the very antithesis of freedom of choice for consumers.

Embarq wants to compete head-to-head for customers and believes carrier selection should be made by the customers who use the service, and not by a developer. Further, as developers have nothing to lose, they seek to force the ILEC to construct facilities, even when there is an exclusive arrangement with a competitor. In these cases, cost recovery is extremely protracted, if even possible at all, because ILECs are limited to marketing only voice services to a very limited number of customers. Such exclusive arrangements may benefit a few developers and providers, but only to the consequent detriment of consumers.

IV. EXCLUSIVE CONTRACTS FOR THE PROVISION OF VIDEO SERVICE ARE PARTICULARLY PROBLEMATIC FOR CARRIERS OF LAST RESORT.

Throughout its ILEC territories, Embarq is generally the Carrier of Last Resort ("COLR") for local telecommunications services. These COLR obligations were originally established when ILECs were the monopoly providers of local telecommunications services in their territories and rates were regulated. In this monopoly, rate-regulated environment, the cost

of providing service in high-cost areas (for which COLR obligations were designed and used) could be distributed over an ILEC's customers throughout its service territory and among all of the monopoly services the ILEC provided. This was done as a matter of public policy to promote universal service.

In today's competitive market, with largely unregulated rates and competitors serving generally in low cost areas, the COLR scheme does not work. This is especially true where a competitive carrier is awarded an exclusive contract for certain services, such as video and, importantly, high-speed internet access. Without the opportunity to gain additional revenues from video and data and without a monopoly, rate-regulated environment to help spread the cost of serving one particular area, facilities deployment for just voice COLR obligations becomes an uneconomic obligation--one that a reasonably prudent business enterprise would not undertake. Therefore, the 1996 Act directed the Commission to make all implicit subsidies explicit. While this has not happened, even at the federal level, competition has undermined the COLR scheme.

Some states are beginning to realize the problems with COLR schemes in today's environment with exclusive arrangements increasing in number.[10] However, none of the states have gone far enough to truly eliminate the problem. For instance, since June 2006, Section 364.025(b)(b), Florida Statutes, sets forth four circumstances that entitle an ILEC to automatic relief from its carrier of last resort obligations. These four circumstances provide for automatic COLR relief if the conditions of telecommunications agreements between a developer and a service provider involve exclusive access, commissions or awards for sales, or centralized billing

[10] Just recently, Embarq has received three more Requests for Proposals for "triple play" services in bulk arrangements with new developments in Embarq's Florida territory.

to the residents through rents, fees or dues. In the approximately one year since Section 364.025 became effective, Embarq has received 14 automatic COLR exemptions in cases where it was denied physical access to place facilities because of other providers having exclusive contracts for voice services.[11]

Unfortunately, the Florida legislation does not go far enough to address the problem Embarq has raised in this proceeding – an exclusive contract for any one of the triple play services renders deployment of facilities for the remaining services uneconomic. Section 364.025(6)(a)3, Florida Statutes, limits communications services to "voice service or voice replacement service through the use of any technology." However, Section 364.025(6)(3) grants the Florida Commission the authority to grant relief from COLR obligations for "good cause shown based on the facts and circumstances of provision of service to the multi-tenant business or residential property."

Recently, the developer of Treviso Bay, a development in Embarq's Florida territory, entered into a bulk agreement for data (high-speed internet) and video services with another provider. That other provider also has a voice service that it actively markets in the area surrounding Treviso Bay. Embarq believed this situation presented no possibility for Embarq to gain customers for high-speed data services and bundles of voice and high-speed data services. Therefore, the situation appears to Embarq to constitute good cause for the Florida Commission

[11] While the Florida statutory relief deals with arrangements for exclusive voice services, it is Embarq's understanding that in most of these 14 cases where the automatic exemption was invoked the arrangements also included video and data services.

to eliminate Embarq's COLR obligation, and Embarq petitioned the Florida Commission for such relief. Thus far, the Florida Commission has disagreed, however.[12]

Embarq will continue to work with the States on reforming COLR obligations. However, the Commission can and should help eliminate this unjust treatment of ILECs, while at the same time helping consumers, by eliminating exclusive contracts, not just for the provision of video services, but of voice and high-speed internet services or any combination thereof.

V. THE COMMISSION HAS THE AUTHORITY TO PROHIBIT EXCLUSIVE CONTRACTS FOR THE PROVISION OF VIDEO SERVICES.

The Commission has the authority to prohibit exclusive contracts, not only for video services but also for voice[13] and high-speed internet services. Section 706[14] provides more than enough authority, specifically for all three services, by granting the Commission regulatory jurisdiction and directing the Commission to ensure the timely deployment of "advanced telecommunications capability" (defined as "voice, data, graphics, and video") and to ensure that happens by, among other steps, "removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

As demonstrated above, exclusive contracts for any one of the triple play services creates a barrier to deployment of networks, especially broadband networks, and that is a barrier to

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[12] Petition by Embarq Florida, Inc. under Section 364.025(6(d), Florida Statutes, for relief from its carrier of last resort obligations, Docket No. 060763. See, Order No. PSC-07-0311-FOF-TP. Embarq has filed a Motion for Reconsideration of that Order, which is currently pending.

[13] Indeed, the Commission prohibited the enforcement of exclusive contracts for voice services with commercial properties. *See, In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* 15 FCC Rcd 22983 (2000).

[14] 47 U.S.C. § 157, nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996).

infrastructure investment which the Commission is directed to remove. Further, exclusive contracts are anticompetitive and prevent consumers from exercising their freedom of choice. The Commission, again, has been directed to remove impediments to competition.

V. CONCLUSION.

Exclusive agreements are barriers to the rapid deployment of broadband and other network facilities and are harmful to consumers and to robust competition. The Commission should prohibit such agreements for video services as well as for voice and high-speed internet access, either singularly or in combination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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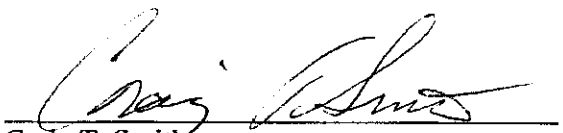

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I hereby certify that a copy of the foregoing Comments of Embarq was delivered by U.S. Postal service first-class mail and electronic mail this 30th day of July, 2007 to the parties listed below:

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